Editor's note: Appealed -- settled, agreement filed Civ.No. 88-C1525 E (ND OK October 22, 1990)

McNABB COAL CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1454 Decided October 14, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming the issuance of two notices of violation and one cessation order, and increasing the assessment of civil penalties. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, and TU 5-1-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally

   A permittee must comply with the surface and ground water monitoring requirements of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations until the successful completion of all reclamation necessary and incident to its past surface coal mining operations and appropriate release of its performance bond, even where current mining operations might be considered exempt from regulation under that Act.

APPEARANCES: Ken Ray Underwood, Esq., and George W. Underwood, Esq., Tulsa, Oklahoma, for McNabb Coal Company, Inc.; Angela F. O'Connell, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The McNabb Coal Company, Inc. (McNabb), has appealed from a decision of Administrative Law Judge Frederick A. Miller, dated May 23, 1986, affirming the issuance by the Office of Surface Mining Reclamation and Enforcement (OSMRE) of notices of violation (NOV) Nos. 84-3-108-11 and 84-3-108-12 and cessation order (CO) No. 84-3-257-4, and increasing the assessment of civil penalties, with respect to mining operations in Rogers and Wagoner Counties, Oklahoma, done pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. || 1201-1328 (1982).

Effective April 30, 1984, OSMRE assumed direct Federal enforcement of the approved Oklahoma permanent regulatory program, pursuant to section 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982). See 49 FR 14674 (Apr. 12, 1984). Thereafter, on August 14, 1984, following an August 10, 1984, inspection of McNabb's mining operations, known as the "North," "South," and "Middle" mines, OSMRE inspector Gene Robinson issued NOV Nos. 84-3-108-11 and 84-3-108-12 (Exhs. R-22 and R-23) to McNabb for failure to conduct both surface and ground water monitoring at the minesites, in violation of 30 CFR 715.17(b) and (h)(3). 1/ The NOV's required McNabb, upon receipt of each NOV, to begin surface and ground water monitoring pursuant to its approved plan, with all records and data to be available for OSMRE inspection by October 15, 1984, and to continue monitoring "UNTIL BOND IS [100%] RELEASED" (Exhs. R-22 and R-23 at 3, 4).

Subsequently, on October 23, 1984, OSMRE inspector Michael A. Lett inspected McNabb's mining operations. Following the inspection, inspector Lett terminated NOV No. 84-3-108-11 effective October 1, 1984, because McNabb had obtained a final bond release on that date with respect to the North mine. See Exh. R-25; Tr. 166, 167-68. However, inspector Lett issued CO No. 84-3-257-4 (Exh. R-38) to McNabb on October 23, 1984, for failure to abate NOV No. 84-3-108-12 by conducting surface and ground water monitoring. The evidence indicates that McNabb had not obtained a final bond release with respect to the South and Middle mines at that time. See Exhs. R-27 through R-29; Tr. 114, 167.

On September 4 and October 26, 1984, McNabb filed applications for review of NOV Nos. 84-3-108-11 and 84-3-108-12 and CO No. 84-3-257-4 with the Hearings Division, Office of Hearings and Appeals. These cases were docketed as TU 4-37-R, TU 4-38-R, and TU 5-1-R. On September 27, 1984, and May 24, 1985, McNabb also filed with the Hearings Division peti- tions for review of proposed civil penalties assessed with respect to NOV Nos. 84-3-10-8-11 ($2,200) and 84-3-108-12 ($2,800) and CO No. 84-3-257-4 ($45,000). These cases were docketed as TU 4-23-P, TU 4-24-P, and
TU 5-24-P. All of the cases were assigned to Judge Miller and consoli-dated for purposes of a hearing and decision by him.

Between January 14 and 16, 1986, Judge Miller conducted a hearing in Tulsa, Oklahoma, at which representatives of both McNabb and OSMRE were present and offered testimony and documentary evidence. Following the hearing, Judge Miller, after considering the various issues raised by the

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1/ In NOV No. 84-3-108-11, OSMRE inspector Robinson identified the applicable area as those portions of State permits 78/79-001/001-A, 78/81-001, 79/80-2013, 79/81-2013, 80/81-3017, and 80/81-3085 lying within sec. 13, T. 21 N., R. 15 E., Rogers County, Oklahoma, described as the "North Mine." In NOV No. 84-3-108-12, inspector Robinson identified the applicable area as those portions of State permits 78/79-001/001-A, 78/81-001, 78/79-002/002-A, 78/81-002, 79/80-2013, 80/81-3017, 80/81-3096, and 80/81-3108 lying within secs. 4, 9, and 16, T. 19 N., R. 15 E., Wagoner County, Oklahoma, and secs. 33 and 34, T. 20 N., R. 15 E., Rogers County, Oklahoma, described as the "Middle [and] South Mines."

parties and the posthearing briefs submitted in support of their respective positions, issued his May 1986 decision affirming OSMRE's issuance of the two NOV's and one CO, and increased the total assessment of civil penalties with respect to the NOV's by $1,000. McNabb has appealed from Judge Miller's May 1986 decision.

The record indicates that appellant initiated surface coal mining operations at its North, South, and Middle mines, under permits issued between June 27, 1978, and December 14, 1981, by the Oklahoma Department of Mines (ODOM), in 1978. However, in the summer of 1981, appellant also began mining noncoal minerals from its minesites pursuant to noncoal mining permits issued by ODOM. See Exhs. R-33 through R-37. Thereafter, on August 5, 1981, appellant obtained full or partial bond releases from ODOM with respect to the mining of coal from portions of its permitted land.
See Exhs. A-6 through A-21. By letter dated May 24, 1983 (Exh. A-25), appellant requested the cancellation of its coal mining permits by ODOM. 2/ In a June 7, 1983, letter to appellant, the Deputy Chief Mine Inspector, ODOM, replied simply that "[y]our coal permits have been cancelled as requested and you will continue to operate under noncoal rules and regu- lations" (Exh. A-26).

On June 2 and 3, 1983, prior to OSMRE's assumption of direct Federal enforcement, OSMRE inspector Steve A. Martin conducted an oversight inspec- tion of appellant's mines and was informed by appellant that it was claiming a "16-2/3 percent exemption" on the basis that coal mining was incidental to its noncoal mining operation 3/ (Exh. A-30 at 2). On the basis of the inspection, inspector Martin concluded that OSMRE had "reason to believe that [appellant] is conducting surface coal mining operations without a valid state permit" and, accordingly, was issuing Ten-Day Notices (TDN) to the State with respect to appellant's operations. Id. The TDN's were issued on June 13, 1983. 4/

2/ Appellant explained that it sought cancellation because "[f]actors beyond our control * * * have reinforced our contention that grave conse- quences will befall all coal operators who remain in Oklahoma" (Exh. A-25). Appellant did not indicate what it meant by "[f]actors," but the record indicates that coal production from appellant's mines had steadily declined as a percentage of total production from January to April 1983. See Exh.
A-36. In April 1983, coal was 17.49 percent of total production (Exh.
A-36 at 1). That percentage had been steadily declining from 28 percent in January 1983. Id.
3/ The "16-2/3 percent exemption" was based on the State equivalent of section 701(28) of SMCRA, 30 U.S.C. | 1291(28) (1982), which defines "surface coal mining operations" subject to the Act as not including the "extraction of coal incidental to the extraction of other minerals where coal does not exceed 16-2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale." This will hereafter be referred to as the 16-2/3 percent exemption.
4/ OSMRE's six TDN's (Nos. 83-3-81-5 through 83-3-81-10) covered permit
Nos. 78/81-001, 78/81-002, 80/81-3017, 80/81-3108, 80/81-3085, and 80/81-3096.

In a December 9, 1983, memorandum to the Director, Tulsa Field Office, OSMRE (Exh. A-33), Samuel Petitto, a Federal Project/Reclamation Specialist, recommended that OSMRE regard appellant's existing mining operations as eligible for the 16-2/3 percent exemption, but in the future subject the operations to annual review. On December 14, 1983, the Director, Tulsa Field Office, issued a memorandum to ODOM in which he stated that an audit of appellant's operations by OSMRE "favor[ed] the McNabb exemption, as it presently exists" (Exh. A-32). There is nothing in the record to indicate that OSMRE thereafter pursued the claim that appellant was conducting sur- face coal mining operations without a valid State permit. 5/

On appeal, appellant does not deny that it had failed to conduct surface or ground water monitoring after June 7, 1983, the date on which ODOM had cancelled appellant's coal mining permits. Nor does appellant deny that the applicable regulations require surface and ground water monitoring. 6/ Rather, it is appellant's principal contention that it was at all relevant times exempt from the surface and ground water monitoring requirements after June 7, 1983, when ODOM cancelled appellant's coal mining permits or that, in the alternative, OSMRE is estopped from enforcing those requirements after that date. In response, OSMRE contends that, although appellant's mining operations may have been exempt after June 7, 1983, 7/ operations

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5/ We are otherwise aware, however, that OSMRE eventually issued CO No. 85-3-257-1 to appellant for mining without a permit on Dec. 17, 1985, following a review of appellant's mining operations which was initiated by the filing of a citizen's complaint and a determination that appellant's operations were not exempt from the permitting requirements of SMCRA because appellant was not extracting coal incidental to its noncoal mining operations. Appellant applied for review of the CO and the matter was heard by Administrative Law Judge Michael L. Morehouse, who vacated the CO in a July 23, 1986, decision. In McNabb Coal Co. v. OSMRE, 101 IBLA 282 (1988), we reversed Judge Morehouse's July 1986 decision, concluding that appellant was not entitled to the 16-2/3 percent exemption. Our deci-sion indicates that we focused on mining operations between June 1983 and December 1985. See id. at 290-91.

6/ There was some question raised before Judge Miller whether appellant was engaging in mining operations pursuant to initial or permanent program permits such that appellant was subject to either the initial or permanent program regulations. In his May 1986 decision, Judge Miller concluded that in either case appellant was required to conduct surface and ground water monitoring. Appellant has not challenged that conclusion on appeal. We agree that appellant was required to conduct surface and ground water monitoring under either the initial program regulations (30 CFR 715.17(b) and (h)(3)) or the State equivalents of the permanent program regulations (30 CFR 816.41(c) and (e), formerly 30 CFR 816.52 (1982)).

7/ For purposes of this case only, OSMRE has stipulated that appellant's mining operations were not surface coal mining operations within the meaning of section 701(28) of SMCRA and, thus, were exempt after June 7, 1983. See OSMRE Memorandum in Support of Motion to Amend Notice of Violation and Cessation Order at 3.

were conducted prior to that date and those operations are subject to the surface and ground water monitoring requirements until the land is fully reclaimed and the bonds released. OSMRE also argues that it is not estopped from enforcing these monitoring requirements.

[1] The primary question which we must address is whether appellant was exempt from compliance with the surface and ground water monitoring requirements under applicable regulations at the time of issuance of the NOV's and thereafter. At the outset, we note that, in spite of OSMRE's stipulation regarding the applicability of the 16-2/3 percent exemption to mining operations conducted after June 7, 1983, the Board in McNabb, supra, concluded that appellant's operations during that period were not exempt. In other words, appellant has at all relevant times before and after June 7, 1983, been engaged in surface coal mining operations within the meaning of section 701(28) of SMCRA and, thus, has been subject to SMCRA requirements. 8/ Nevertheless, even assuming that appellant's opera- tions were exempt after June 7, 1983, we conclude that operations conducted prior to that date were subject to the surface and ground water monitoring requirements until the land was fully reclaimed and the bonds appropriately released.

There is a fundamental flaw in appellant's analysis which improperly led it to conclude that it was no longer subject to any SMCRA requirements after June 7, 1983. Activities which fall within the 16-2/3 percent exemption are not considered "surface coal mining operations" as that term is defined in section 701(28) of SMCRA, and thus are not subject to any SMCRA requirement applicable solely to such operations. However, SMCRA also sets forth various requirements applicable to "reclamation operations," i.e., "all activities necessary and incident to the reclamation of [surface coal mining] operations." 30 U.S.C. | 1291(27) (1982). Accordingly, even following the conclusion of surface coal mining operations, a permittee is still subject to certain SMCRA requirements until the successful conclusion of all activities "necessary and incident" to the reclamation thereof. OSMRE v. Calvert & Marsh Coal Co., 95 IBLA 182, 189 (1987); Citizens for the Preservation of Knox County, 81 IBLA 209, 218-19 (1984); see also Clear Creek Coal Co. v. OSMRE, 101 IBLA 6 (1988), appeal filed, Clear Creek Coal Co. v. Hodel, No. 2-88-0017 (M.D. Tenn. Feb. 18, 1988); Lone Star Steel Co. v. OSMRE, 98 IBLA 56 (1987).

8/ Appellant purports to find a contrary conclusion in the final order and judgment, dated Aug. 6, 1986, of Chief Judge H. Dale Cook in Oklahoma Wildlife Federation v. McNabb Coal Co., No. 85-C-964-C (N.D. Okla.). In that case, the plaintiffs had sought a declaratory judgment that appellant was conducting surface coal mining operations within the meaning of SMCRA and an injunction preventing appellant from conducting any operations until it had obtained a coal mining permit. The court found in favor of appel-lant in the absence of sufficient proof that appellant had violated any rules, regulation, order or permit. There is no affirmative finding that appellant was exempt at any time from the requirements of SMCRA.

In particular, we note that section 515(b) of SMCRA, 30 U.S.C. | 1265(b) (1982), provides that certain general performance standards "shall be applicable to all surface coal reclamation operations." Specifically with respect to surface and ground water, section 515(b)(10) of SMCRA 1265(b)(10) (1982), which is applicable during the initial and permanent program provides that a permittee shall " disturbances * * * to the quality and quantity of water in surface and ground water systems both during and after mining operations and during reclamation." In addition, we note that section 517(b) of SMCRA, 30 U.S.C. | 12(directs the regulatory authority to require a permittee to install, use, and maintain necessary monitoring equipmen results and to submit monthly reports and other information "relative to surface coal mining and reclamation operati to assist the regulatory authority with enforcement of the Act. This monitoring requirement is specifically made surface and ground water systems by 30 CFR 715.17(b) and (h)(3) and the State counterparts of 30 CFR 816.4 Moreover, that requirement is equally applicable during the period of recla- mation and surface coal mining operat

Thus, it is clear that the monitoring requirement embodied in section 517(b) of SMCRA and implemented by reg as those involved herein does not cease until the successful conclusion of reclamation operations under the Act. 9/ Su completion is generally signalled by final release of the performance bond. See 30 U.S.C. | 1269(c)(3) (1982). Th reached herein is supported by the fact that monitoring and assem- bling the results of such monitoring is necessary where it is the regulatory authority, to assess whether reclamation has been successfully completed and to decide whe release the bond. See Tr. 62-63.

In the present case, appellant admits that it engaged in surface coal mining operations within the meaning of sec of SMCRA prior to June 7, 1983. See Tr. 375. Thus, appellant was required to abide by the monitoring requirement to surface and ground water systems until at least the successful completion of all activities "necessary and incident" to of those surface coal mining operations. 10/

9/ We note that 30 CFR 816.41(c) and (e), while recognizing that the required monitoring may be modified depend specifically state that surface and ground water monitoring "shall proceed through mining and continue during recl bond release." Under section 519(c)(3) of SMCRA, 30 U.S.C. | 1269(c)(3) (1982), no bond shall be fully relea reclamation requirements * * * are fully met." Thus, the monitoring requirement ceases upon successful completion o and release of the bond. There is no comparable language to that in the permanent program regulations in 30 CFR 7 (h)(3). Nevertheless, we conclude that the monitoring requirement in those initial program regulations, likewise, d until the successful completion of reclamation and release of the bond.

10/ On appeal, appellant suggests that it was not subject to the water monitoring requirement after June 7, 1983, wh no evidence that

The question then becomes whether appellant had successfully completed all reclamation operations as of August 14 OSMRE issued the NOV's involved herein.

Cancellation of appellant's coal mining permits by ODOM is not indicative of a determination that appellant had completed the reclamation of its surface coal mining operations conducted prior to June 7, 1983, and, thus, was no lo to abide by the water monitoring and other reclamation requirements. See Claypool Construction Co., 1 IBSMA 25 I.D. 486, 492 (1979) (no permit). Nor is that intent expressed in the Deputy Chief Mine Inspector's June 7, 1983, le 26). Cancellation merely indicates at best that ODOM regarded appellant's ongoing operations as no longer subje Indeed, we note that an ODOM hearing examiner specifically concluded in a January 13, 1986, decision (Exh. A- that, while appellant's mining operations were exempt from SMCRA require-ments following cancellation of its permit, "surface coal mining reclamation requirements left undone at [that time] * * * must meet the standards se Interim Rules." Likewise, in an August 21, 1985, decision (Exh. R-31), at page 4, an ODOM hearing examiner ord areas mined prior to June 7, 1983 [by appellant] * * * be reclaimed to Permanent Program Rules and Regulations."

Nor can we conclude that ODOM's full or partial release of appellant's bonds with respect to portions of the pe constituted a determination that appellant had successfully completed reclamation of all of the permitted land. 1 Mining Co. v. OSMRE, 100 IBLA 300, 303 (1987). Indeed, the mere fact that appellant had not obtained a final rel its bonds as of August 14, 1984, when OSMRE issued the NOV's involved herein indicates that appellant had n reclamation of all of the previously mined areas prior to that date. See 30 U.S.C. | 1269(c)(3) (1982). Moreover, eve complete release by ODOM would not have been binding on OSMRE. OSMRE v. Calvert & Marsh Coal Co., su

That appellant had not completed reclamation by August 14, 1984, is further borne out by the testimony of OSM Robinson that he observed that areas mined between May 1978 and May 1983 were "in various

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fn. 10 (continued)
its operations were adversely affecting water quality. However, it is clear that the requirement is imposed by applicabl regardless of whether any adverse effect is actually occurring.

11/ On appeal, appellant asserts that the partial bond releases established that ODOM "considered McNabb's water without fault" (SOR at 6). The partial releases submitted by appellant arose for the most part as a result of the con of grading and revegetation. See Exhs. A-6 through A-13, A-16, A-18, A-21. Moreover, partial releases are app SMCRA only in the case of completion of backfilling, grading, drainage control, and revegetation (see 30 U.S.C. | 12 and, accordingly, do not indicate that reclamation operations have been completed without any detriment to surfac water systems or that a permittee is no longer required to monitor such systems.

stages of reclamation" at the time of his August 10, 1984, inspection, imme- diately prior to issuance of the NO
OSMRE also introduced the testimony of OSMRE inspector Lett who, based on a review of aerial photo-graphs taken
areas at various times prior to and on June 1, 1983, testified that these areas either had been mined within that time p
undergoing active mining as of June 1, 1983. See Tr. 216-19, 235, 245-46, 266-69, 276. However, inspector Let
to testify whether the areas were being mined for coal or other noncoal minerals because he had not inspected the
June 1, 1983. See Tr. 223-24. On the other hand, appellant introduced no evidence that the mining did not involve
of coal. Appellant's position has been that coal was being mined even as late as June 7, 1983, and thereafter, but tha
qualified for the 16-2/3 percent exemption. See Tr. 309-11. In addition, ODOM verified that coal did not reach
16-2/3 percent of total production until May 1983. See Exh. A-36. In this context, we conclude that inspector Let
is indicative of coal mining prior to June 1, 1983, which mining was then subject to reclamation after that date. W
Judge Miller that it was "legally impossible" for recently mined areas as of June 1, 1983, to be "free of regulatory
under the Act by August 14, 1984," where the areas could not be considered fully revegetated for at least two grow
under the initial regulatory program or 5 years under the permanent regulatory program. Decision at 5; see 30 U.S.C.
(1982); 30 CFR 715.20(f)(2). Moreover, appellant has offered no evidence that areas mined for coal prior to June
been completely reclaimed by August 14, 1984. Rather, the testimony of Virgil Tipson, appellant's Director of Perm
that the contrary is true. See Tr. 377.

Accordingly, we conclude that appellant was subject to the surface and ground water monitoring requirements w
reclamation of its pre-June 7, 1983, surface coal mining operations at the time of issuance of the NOV's. In th
compliance with those requirements, we conclude that OSMRE properly issued the NOV's.

It is also clear that, following issuance of the NOV's and prior to October 23, 1984, when OSMRE issued the
herein, appellant did not initiate surface and ground water monitoring with respect to reclamation of its pre-June 7,
coal mining operations or assemble monitoring data as required in the NOV's. Accordingly, we conclude that appe
abate the violations cited in the NOV's, for which OSMRE properly issued the CO. Grays Knob Coal Co. v. OSM
171, 173 (1987).

Appellant argues, however, that, even assuming the applicability of the surface and ground water monitoring r
OSMRE is estopped from enforcing those requirements where OSMRE "assured McNabb that they were exem
inspection [and enforcement under SMCRA and] * * * McNabb relied on these representations and ceased to monit
(SOR at 8).

12/ Appellant also refers to representations by ODOM. However, it is clear that a state official's interpretation of
not bind or give rise to an estoppel against OSMRE. Clark Coal Co. v. OSMRE, 102 IBLA 93, 98 (1988).

Appellant has not identified any "representations" by OSMRE that appellant was specifically exempt from compli surface and ground water monitoring requirements with respect to reclamation of surface coal mining operations co to June 7, 1983, rather than that its post-June 7, 1983, mining operations were exempt from inspection and enforcer 336-37, 341, 348. In fact, Judge Miller specifically found that:

> [B]oth before and after May 12, 1984, there was no statement from OSM that McNabb was free from regulation o mined before June 7, 1983. There was no representation, let alone a misrepre- sentation, that McNabb was f complying with the law on areas mined before June 7, 1983, regardless of the validity of the exemption for continu [13/]

(Decision at 10). Accordingly, Judge Miller concluded that there was no basis for invocation of the doctrine of equit against OSMRE. We agree.

In order for estoppel to lie against an agency of the Federal Government, there must be an affirmative misrepr concealment of a material fact by that agency. United States v. Harvey, 661 F.2d 767, 773-74 (9th Cir. 1981), cert U.S. 833 (1982). Appellant has identified no such affirmative misconduct. Nor can we construe OSMRE's failur enforcement action against appellant between June 7, 1983, and August 14, 1984, as constituting affirmative actio See Shelbiana Construction Co. v. OSMRE, 102 IBLA 19, 23 (1988); River Processing, Inc. v. OSMRE, 76 IBLA 90 I.D. 425, 432 n.6 (1983), aff'd, River Processing, Inc. v. Clark, No. 83-316 (E.D. Ky. May 2, 1985). Moreover, u principles of equitable estoppel, the person seek-ing estoppel must be ignorant of the true facts. United States 514 F.2d 406, 412 (9th Cir. 1975). As Judge Miller correctly noted, that is not the case herein. Appellant must be dee that SMCRA and its implementing regulations required continued compliance with the surface and ground wate requirements until the successful completion of reclamation of its pre-June 7, 1983, surface coal mining operations an release of its bonds. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Clark Coal Co. v. OSMRE, Shelbiana Construction Co. v. OSMRE, supra at 22. Accordingly, we conclude that OSMRE was not estopped fr the surface and ground water moni-toring requirements at the time of issuance of the NOV's and CO.

13/ As noted by Judge Miller, May 12, 1984, was the date OSMRE reclama-tion specialist Petitto conducted an appellant's minesite and prepared an inspection report (Exh. A-5). In that report, reclamation specialist Petit appellant's mining operations were in an "exempt status," effective June 7, 1983 (Exh. A-5, at 1). However, the re indicate that Petitto advised appellant that it was exempt from compliance with surface and ground water monitoring with respect to reclamation of pre-June 7, 1983, mining operations. Moreover, OSMRE's response to the report w with the inspection and enforcement involved herein. See Tr. 97.

As a final matter, appellant contends that the civil penalties assessed by Judge Miller with respect to issuance of th CO are "excessive in light of McNabb's exemption" 14/ (SOR at 9). However, as we here con- clude, appellant wa from compliance with the surface and ground water monitoring requirements with respect to reclamation of its pre- surface coal mining operations after that date. Accordingly, we con- clude that, to the extent OSMRE properly issue and CO, OSMRE also properly assessed civil penalties in accordance therewith.

Judge Miller increased the civil penalties assessed with respect to the NOV's based on his application of the formula in 30 CFR 845.13 and 845.14. An identical formula is set forth under the initial program regulations. See 30 and 723.14. Appellant has demon- strated no basis for concluding that the civil penalty assessed by Judge Miller is e we can discern none. 15/ Accordingly, we conclude that Judge Miller properly assessed civil penalties in the amou with respect to each of the violations cited in the NOV's and $45,000 with respect to appellant's failure to abate follow of the CO. Grays Knob Coal Co. v. OSMRE, supra at 174-76; Clinchfield Coal Co. v. OSMRE, 95 IBLA 360, 37 appeal filed, Clinchfield Co. v. Hodel, No. 87-0061-A (W.D. Va. Mar. 20, 1987).

14/ OSMRE asserts on appeal that the Board has no jurisdiction to consider the propriety of the civil penalties wh did not file a peti-tion for discretionary review pursuant to 43 CFR 4.1270. While appellant's notice of app denominated as a petition for discretionary review and failed to specifically allege any errors in Judge Miller's disp issue of civil penalties in accordance with 43 CFR 4.1270(c), we will nevertheless treat the notice as a petition for review where appellant timely appealed Judge Miller's May 1986 decision and subsequently amended its notice of a 22, 1986, to specifically challenge the "amount of the penalty," and we can discern no prejudice to OSMRE thereby Brothers, Inc. v. OSMRE, 97 IBLA 78 (1987). That petition is now granted.

15/ Judge Miller specifically altered the penalties assessed in each case primarily on the basis of his determination t than 10, points should be assigned under the category of seriousness, based on the extent to which enforcement w by appellant's failure to monitor sur- face and ground water. The assignment of 15 points is clearly permitted 723.13(b)(2)(iii) and 845.13(b)(2)(iii). Judge Miller also decreased the points assigned under the category of negli within the limits permitted by the applicable regulations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43
May 23, 1986, decision of Administrative Law Judge Frederick A. Miller is affirmed.

John H. Kelly
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member